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Legislative Power to Fix Railroad Charges

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T H E S I S

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In endeavoring to ascertain whether or not state legislatures have power to fix the prices for which railroad corporations shall carry passengers and freight. or to put the question in a different form, the right of fixing a maximum rate at which such services must be performed, we will at the outset give a short and concise historical account of the origin and exercise of that right by the sovereign power of states which is commonly designated as the "police power" of a state.

What this police power is, what its limits, are questions which eminent jurists have been unable to satisfactory answer. To lay down any well defined definition is impossible. The very best which layman can

do is to say when this comes within or that without the police power of the state. Probably the very best definition which as yet has been given is that by Chief Justice Shaw, in Commonwealth vs Alger, cited in 7 Cush. 53. To quote the words of Shaw J. " We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property however absolute and unqualified may be his title, holds it under the implied liability that the use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in the Commonwealth is --- held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and ex-

pedient." The Justice goes on in his definition and distinguishes this power known as police power from that power which is exercised by the government under the name of "Eminent Domain." It is by the exercise of this police power that State Legislatures have the right to "make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."

When one becomes a member of society he necessarily parts with some rights or privileges which, as an individual not affected by his relation to others, he might retain, When one thus becomes a member of society or as one of the component parts of the "body politic" he must submit to those rules and regulations which are deemed necessary for the benefit of all. To define "body politic" we can do no better then quote the words of the framers of the Mass. Constitution as laid down and defined in the preamble of that Constitution. "A 'body politic' is a social compact by which the whole peo-

ple covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good." And yet, recognizing this power of control which is to be properly exercised by the machinery of the government over its subjects, still it does not confer upon that government or its agents; or upon the whole people the right to restrain, check or even to control rights which are purely and exclusively private. There are certain "inalienable rights" if we may so call them, which by nature attach to all human beings, the exercise of which marks them as such; yet, nevertheless, ~~it does authorize the establishment of~~ with this possible exception the government is authorized to enact laws requiring each citizen to so conduct himself, and so to use his own property, as not necessarily to injure another.

This is the very essence of government, and has found expression in the maxim "sic utere tuo ut alienum non laedas." From this source comes the police powers, which as was said by Justice Taney "are nothing more or less than the powers of government in every Sovereign----that is to say----the power to govern men

and things." Under this power the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulations as shall become necessary for the public good.

Such has been considered as a necessary required right of a government from the first, that is, as soon as a well formulated idea of an organized government became seated in the mind of man. From the recorded acts of the Sovereign of England we have examples of the exercise of governmental power as early as during the reign of William and Mary, that is the exercise of governmental power in regard to the fixing a rate of charges to be made by those engaged in a business in which the public had an interest, and an example will be given a little later in this essay.

This right and authority of the sovereign power to control and manage property in any way affected with a public interest has never been judicially denied. The principles upon which this power of legislative regulation rests are found among the fundamental ideas

of law and justice as administered according to common law. In a small book publised by Chief Justice Hale, entitled "De Portibus Maris," the author says "When private property is affected with a public interest it ceases to be juris privati only" and this statement has been accepted without objection as an essential in the law of property every since.

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affects the community at large. When, therefore, one devotes his property to an use in which the public has an interest he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent, at least, of the public interest he has thus created. He may withdraw the grant by discontinuing the use, but as long as he maintains the use, he must submit to the control." In accordance with this idea all property which was ~~dedicated~~ devoted to the use of the public or in the use of which the public had an interest came under the control of the sovereign power of the state to be

managed in a way which would enure to the best interest of the public at large. From the same source comes the power to regulate the charges of common carriers, a power which, as previously stated, was exercised in England as early, at least, as the third year of the reign of William and Mary. To quote the exact words of the statute or provision:- " And whereas divers Wagoners and other Carriers, by Combination amongst themselves, have raised the Prices of Carriage of Goods in many Places, to excessive Rates, to the grat Injury of Trade; Be it therefore enacted by the Authority aforesaid, That the Justices of the Peace of every County and other Places within the Realm of England or Dominion of Wales, shall have Power and Authority, and are hereby enjoined and required, at their next respective Quarter or General Sessions after Easter Day yearly, do assess and rate the Prices of all Land-carriage of Goods whatsoever, to be brought into any Place or Places within the respective Limits and Jurisdictions by any common Waggoner or Carrier, and the Rates and Assessments so made, to certify to the several Mayors and other Chief

Officers of each respective Market-town within the Limits and Jurisdictions of such Justices of the Peace to be hung up in some publick Place, in every such Market-town, to which all persons may resort for their Information; and that no such common Waggoner or Carrier shall take for Carriage of such Goods and Merchandizes above the Rates and Prices so set, upon Pain to forfeit for every such Offence the Sum of five pounds to be levied by Distress and Sale of his and their Goods, by Warrant of any two Justices of the Peace where such Waggoner or Carrier shall reside, in Manner aforesaid, to the Use of the Party grieved."

Having thus endeavored in an historical manner to show briefly, and yet in a concise and understanding way, that it is within the proper scope of the sovereign power of a state to have and to exercise a right of control over property devoted to a public use, we will in the next place turn our attention to the giving of an historical proof, by which it will be our purpose to show that it is a proper exercise of power on the part of State Legislatures to control all property with-

in its territory which is affected with a public use, and a proper use of which is necessary for the public good.

When the people of the United Colonies separated from Great Britain they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State Constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States, and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of

England, except such as have been delegated to the United States, or reserved by the people. The reservations by the people are shown in the prohibitions of the Constitutions.

Accordingly by our system of government we have a Sovereignty within a Sovereignty. One Sovereignty being of restricted powers, the national government, the other of reserved powers, that of the States. All powers which are not expressly reserved or granted to the national government, as set forth in the National Constitution, still rests in the States.

Down to the adoption of the Fourteenth Amendment of the Constitution of the United States, it was never thought, at least it was never openly expressed, that the States or sovereign powers of the States, did not have the right to regulate charges, either of freight or carriage of passengers, to be made by any person or body of persons who devoted their time and employment to a purpose in which the public had a general and a public interest. And it was not until after the adoption of that Amendment that any denial of such a right was

was advanced. The wording of the Amendment upon which such a denial of the right was based, was "no state shall pass laws whereby any person shall be deprived of his property with out due process of law."

This principle as laid down in the Amendment although new as a provision of the Constitution limiting the powers of the states, yet it is old as a principle of civilized government. It is found in the Magna Charta, and in substance, if not in form, in nearly or quite all the constitutions, that have been from time to time adopted by the several states of the Union. By the Fifth Amendment it was introduced into the Constitution of the national governemnt, and by the Fourteenth Amendment, as a guaranty against any encroahment upon an acknowledged right of citizenship by the legislatures of the States.

To allow that any act of the legislature by which it compels persons and corporations, who are devoting property to public use, from violating a public trust, or from taking advantage of the position which they occupy, is unlawful, would be utterly unreasonable and

such a view would not be founded upon any rule of usage or principle of justice. The very position which they occupy demands the exercise of such a power by the legislatures as the representatives of the people and the trustees of their rights and interests.

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or for the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, if he will take the benefit of that monopoly he must, as an equivalent, perform the duty attached to it on reasonable terms." Who shall say what is reasonable is the question now under discussion. Surely it would be unsafe to leave it to the person or persons exercising the monopoly, and hence it has always been placed in the Sovereignty of the state, and in the states as unites of the Union that power is vested by the people in the legislatures of the different states.

Turning our attention to Railroad Corporations we find them

we find them to be "quasi public corporations; and bound by laws regulating the powers and duties of common carriers of persons and property." To quote the words of Judge Baxter, "Its road, although owned by a corporation, was nevertheless constructed for public use, and is in a qualified sense a public highway. Hence every body constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities which it is capable of affording. Its owenership by the corporation is in trust, as well for the public as for the shareholders: but its first and primary obligation is to the public." The company's ownership of the property is connected with an enjoyment, also, of a public franchise. And in exercising a control over its property it has not the same measure of power that is allowed private persons or corporations whose property is in no wise, affected by a public use and operated without the exercise of any public franchise.

Thus the R.R. corporation is an institution formed almost exclusive for the purpose of rendering to the public a service in which each and every member of the public is, in a greater or less extent, interested. Its power is governed by its charter, granted by the state, and whenever it acts, it is necessary that the corporation shall have performed its work, in a manner consistent with the purposes of its creation.

Whenever the state legislature has attempted to exercise its authority over the control and management of R.R. Corporations in regard to the fixing of charges and rates for carriage of goods and passenger, she has been met with strong opposition on the part of the corporation. The main and most important arguments advanced by the cprporations in their attempt to thwart the state legislatures in the exercise of this power over the management of their property is the following:--

I. That such legislative provisions are in violation of that provision of the United States Constitution which grants to Congress the power to regulate commerce between the states and with foreign countries.

II. That were the state legislatures allowed thus to legislate

it would result finally in depriving persons of their property without due process of law.

III. That such provisions are unconstitutional on the ground that they impair the obligations of contracts.

IV. That the proper power to say whether charges made by a railroad are reasonable or not, is for the judiciary and not the legislature and therefore any such provision enacted by the legislature ought to have no force whatever; and not be binding upon the railroad corporations.

The legislature must limit itself to legislating for corporations acting wholly within the state. Should it attempt to govern the price for which articles of commerce are to be carried from one state to another, such an attempt would be clearly an interference with the powers of Congress and void. But the question under consideration is;- Has the state the power to regulate the price for which goods should be carried from one point within the state to another also within the same state? In every case in which the question has squarely came up before the courts of the United States ~~Courts~~ the decision of the court has always been in the affirmative.

This question came fairly before the United States Supreme Court, in the case of Railroad Company vs. Fuller, cited in 17 Wall., 560. In this case an act was affirmed which provided;-

1. " That each railroad company should annualy, in a month named, fix its rates for transportation of passengers and freights."

2. " That it should on the first of the next month cause a printed copy of such rates to be put up in all of its stations and depots and to be kept up during the year."

3. " That the failure to comply with these requirements, or the charging of a higher rate than was pasted, should subject the offending party to penalties."

The court in this case held that the state acted within its own proper domain, and the power which they had exercised was exclusively their own, and, while the legislature so acts Congress cannot interefere, Bradly J. says: " The Fourteenth Amendment does not invest Congress with power to legislate upon subjects which are within the domain of State legislation, but to provide modes of relief against State legislation or State action of the kinds referred to. It does not authorize Congress to create a code of municipal

law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers executive and judicial when these are subversive of the fundamental rights specified in the amendment.

The Railroad being, as they are, quasi public corporations are subject to the police regulations of the state. They derive their existence from the state and are therefore subject to the state control even more completely than individuals. Corporations created for public purposes and invested with large powers as railroad corporations are can properly be required to do obedience to legislative control. They hold themselves out as public benefactors, and it is necessary to compel them to so act that injury may not result to the community.

" We know that this is a power which may be abused but there are no arguments against its existence." The argument, that if the states legislatures are allowed to exercise this power without reserve or restriction placed upon them by some higher power, will result in depriving persons of property without due process of law, is an argument, without foundation, and but a mere legal fiction which cor-

poration lawyers have attempted to use for the purpose of blinding the eyes of the Judges. It would be beneath the dignity of any judge or court to look upon the legislative body of a state as a compact of men of the most unscrupulous kind; which would be necessary were this argument granted favor. The courts say:- 'We see that an abuse of power is possible. In truth, the legislature may so fix the maximum rate that it may possible be so low that Railroad companies will find it impossible to carry on business at a profit; but we shall not consider it our duty to say that the legislature had any other intent in mind other than that of serving the public in the best manner possible according to their best judgment.' The Court in addressing itself to the corporations says:- 'Your remedy is to resort to the votes of the people, prove to the public your exact situation and appeal to the people for help, we cannot give you relief.'

The third argument advanced by the Railroad corporations is, that such interference on the part of the legislature is an unconstitutional impairing of the obligations of contracts. Whether or not such a regulation is to be regarded as impairing the obligations of contracts, depends

entirely upon the wording of the charter granted to the corporation by the state. In construing the terms of the charter the courts have always been prone to take it most stictly against the corporation, and not to consider the state as granting away any of its powers to a small body of men unless, such a grant is expressly stated. This position of the court is based upon principles of public policy. It is better that a few should suffer rather than the whole public. Where the state has in express terms granted to the corporation the absolute power to fix its own rates of charges for the carriage of freight and passengers, the court will not uphold the state in interfering, unless it is clear that the corporation violated the trust which has been imposed in it as a benefactor of the public. There is an implied contract even in such cases, that the corporation will not charge more than a reasonable compensation for its labor, and when it does and attempts to take advantage of the position which it occupies, it is a duty which the legislature owes the people whom it represents to restrain such a violation on the part of the corporation.

In this connection arises the question, is it the

legislature or judiciary, with whom rest, properly, the authority to say what is and what is not reasonable charges. In a comparitively late case decided by the Supreme Court of the United States, the court, held in favor of the judiciary, but not without a strong dissenting opinion written by Justice Bradly, Although I might seem rather egotistic or presumptive, I must say that in my mind, the dissenting opinion in this case is the better opinion of the two. To quote the words of Justice Bradley:- " The governing principle of those earlier cases was that regulation and settlement of fares of Railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard of great importance, When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the state itself. (A rather strong assertion I must admit). It is chartered as an agent of the State for furnishing public accommodations. The State might build its railroads if it saw fit. It is its duty and prerogative to provide means of inter-communication between one part of its territory and another. And this duty is devolved upon the legislative department." He then goes on to say

that where the legislature does not tie its hands by an express contract with the corporation, it still retains and has the exclusive power to step in at any time and say what charges are reasonable and what are not. There are three cases which may arise:-

I. Where the legislature has tied itself up absolutely by contract with the corporation, in which case the corporation alone has power to fix its charges, and any interference on the part of the state would be regarded as impairing the obligation of contract;

II. Where the state grants to the corporation the right to fix its own charges making the single limitation that such charges must be reasonable; and,

III. Where nothing is said at all in the charter as to who shall fix the rates of charges. In which case the state has reserved to itself the power of making whatever regulations it may from time to time deem necessary for the public good.

It is only in those cases where the question as to what is reasonable or what is not, is an open one that the judiciary has any authority at all. In all cases where the

legislature fixes the charges or a maximum rate, the judiciary is absolutely bound and can not go behind the legislative curtain and declare such charges unreasonable.

In summing up we might say in a general way,- that the State legislatures, have absolute authority to fix a maximum rate of charges for Railroad corporations carrying passengers or freight between points situated wholly within the state, providing the State has not expressly contracted away such right in the charter granted to the corporation.